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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-281

NICHOLAS VOWTERAS and NESTOR VOWTERAS,
Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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September, 1974

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IN THE

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No.

NICHOLAS VOWTERAS and NESTOR VOWTERAS,
Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Petitioners, Nicholas Vowteras and Nestor Vowteras, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 18, 1974.

Opinion Below

The opinion of the court of appeals is not yet reported, but is reprinted in Appendix A, *infra*.

Jurisdiction

Petitioners were charged with conspiracy and bribery under 18 U.S.C. §§ 2, 201(b) and 371, for allegedly bribing an Internal Revenue Service agent. On December 7, 1973 the jury found both petitioners guilty of those crimes. On March 1, 1974 petitioners were each given a one-year sentence, two months to be served in prison and ten months on probation. The court of appeals affirmed the judgments of conviction on July 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether petitioners were entrapped as a matter of law and denied due process where their convictions were based upon criminal conduct which they were not predisposed to commit, which would not have occurred and which would have been impossible without the government's outrageous inducements and active participation.

2. Whether the trial court, when presented with uncontradicted evidence that one of two defendants with hostile defenses, represented by the same lawyer, was sufficiently mentally impaired to question his ability to decide whether to seek separate counsel and to assist in his own defense, must hold a hearing to determine his competency to waive these constitutional rights.

And, whether the court must order separate counsel if failure to do so violates petitioners' sixth amendment right to counsel and fifth amendment right to due process of law.

Constitutional Provisions Involved

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

We have reproduced the relevant statutes in Appendix B, *infra*.

Statement of Facts

Since 1939 petitioners have owned and operated an air compressor sales and service company in Jackson Heights, New York (61, 69, 1056).[1] Their character is untarnished and was attested to by long-time friends, one of whom is a sitting Judge of the New York Criminal Court (1221, 1226). Petitioners' company services approximately 400 customers per week, 20,000 per year (1215).

In August, 1972 petitioners' corporate income tax return was selected for audit by the Internal Revenue Service (52). Thereafter, IRS Agent, Kenneth Cooley, appeared at the company's office to conduct a field audit.[2] He interviewed petitioners and toured their facilities (94). Corporate books and records were promptly furnished to him (84). Petitioners' accountant had assured them their affairs were in order and there would be no problem (1180).

While touring the facilities, the agent mentioned the fact that he had just purchased a new home, worked a second job and had numerous personal expenses (363, 1065, 1366). He was offered an air compressor at wholesale cost but declined to purchase one, claiming he did not need it (1071, 1133). He later spoke with an assistant regional inspector (101), and then embarked upon an IRS policy of nurturing a bribery on the part of petitioners (381, 429-430). When he next appeared at petitioners' office the agent was outfitted with a Nagra tape recorder and a Kel transmitter

[1] Numbers in parentheses refer to pages in stenographic trial transcript.

[2] Due to his previous involvement with bribe offers (361), agent Cooley had recently been assigned to a section of the IRS which specialized in developing and exposing bribes (362, 1002, 1009). Cooley deliberately misrepresented the location of his office in order to disguise the character of his investigation (355).

(107). Thus, lengthy conversations between petitioners, their accountant, and the agent were tape recorded.

Some of those recordings related to discussions involving the "Commissions Expense" and the "Travel and Entertainment" accounts claimed as business deductions on the corporate income tax return (118). Agent Cooley learned from petitioner, Nicholas Vowteras, and the company's accountant, that the commissions account consisted of cash payments to maintenance men, supervisors and purchasing agents of petitioners' customers (124, 1134). The agent was told that the nature of the industry required these gratuities in order to maintain a competitive sales volume (125-126).[3]

The recipients would not accept anything but cash (125), which made it virtually impossible to document the deductions. However, the company's high level of sales, the petitioners' modest life style, and their many years of dedicated service to building their company, demonstrated that these payments were in fact made (A71).[4] Moreover, numerous checks made out to cash and endorsed by petitioners at the rate of approximately six per month paralleled their record of sales (124-125). Even agent Cooley was convinced that the deduction was legitimate. In a conversation on November 29, 1972 he told Nicholas Vowteras and the company's accountant that based on the testing he had done, he had satisfied himself regarding the deductions (A78).

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[3] Such payments form legitimate tax deductions where, as in New York, state penal sanctions against commercial payments of this sort are not regularly enforced. Internal Revenue Code, §§ 162, 162(c)(2); *Comm'r* v. *Tellier*, 383 U.S. 687 (1966); *Comm'r* v. *Sullivan*, 356 U.S. 27 (1958); *Lilly* v. *Comm'r*, 343 U.S. 90 (1952).

[4] Numbers preceded by "A" refer to pages in the appendix filed in the court of appeals.

Cooley's audit was punctuated with remarks which inveigled petitioners to alter their approach to the problems presented by the audit.[5] Throughout, petitioners simply sought advice from Cooley as to the proper way to report these deductions and urged the agent to exercise his discretion in preparing his report (1080, 1087). They did not want to unfairly affect his judgment (1119).[6]

Cooley's responses to petitioners' efforts to negotiate the potential tax liability created the impression that the agent was trying "to shake [petitioners] down" and to extract payment from them for favored treatment (1095, 1112, 1114, 1125). Cooley never advised petitioners that any-

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[5] Cooley bombarded petitioners with comments such as:

"Well, it's not my position, it's my job."

"Well, what would you like me to do?"

"Well, well you tell me what you would like me to do."

"Yeah, but why, why am I giving you a break?"

"Well, every audit is separate and every agent works differently . . . ."

"Unless you make things more concrete, I'm doing my job exactly the way I have to do my job."

"You have to say it. I can't say it."

"There's only two ways I can do it and only one way is the right way."

". . . I'd like to know what I'm getting."

". . . what's expected of me for that?"

"Now, do you realize that if you give me this [list of names], . . that this could involve any one of these people."

"Well, you tell me what you have in mind."

These statements were received in evidence by means of playing the tape recorded conversations. The transcripts of those tapes were marked for identification and submitted to the jury. *See* A70-A100, *passim*.

[6] If disallowed, the amounts claimed in the commissions expense deduction ($63,000) and in the travel and entertainment deduction ($58,000) would have been taxed at the rate of 48% (211-212). The corporation's tax deficiency would have been approximately $43,000. Additionally, personal income tax deficiencies could have been assessed against petitioners.

thing they said was improper (1115). He put them in a "frenzy" with his calculated efforts to induce a bribe (1113). Petitioners, however, had consulted special tax counsel and had been instructed to avoid involving themselves in any attempt to bribe the agent (1130), and, therefore, were not disposed to tamper with the audit.[7]

Cooley then told petitioners to identify the recipients of the cash payments as a means of documenting their deductions (A87, A90). A twelve page list of over 400 names was prepared and actually placed in front of Cooley for a brief period (222, 1135). However, Cooley's intention to include that information in his work papers, with the accompanying disastrous effect on the business, made it impossible for petitioners to disclose those names (131, 132; A74). Word would quickly circulate in the industry and many accounts would be lost (A76).

Under this pressure, on December 21, 1972 petitioner Nester Vowteras, agreed to pay Cooley $15,000 to approve the deductions (244). Cooley agreed and accepted an initial payment of $5,000 (263, A101). On December 27, 1972 he returned and accepted an additional $10,000 (266, A102). Petitioners were subsequently indicted for three counts of bribery and one count of conspiracy. Nicholas was convicted of conspiracy and one count of bribery. Nestor was found guilty as charged.

Prior to trial the district court, recognizing an existing conflict of interests, inquired of petitioners as to the wisdom of their representation by the same lawyer (A7, A12-A13, A29). For reasons developed in a post-trial motion, petitioner, Nester Vowteras, was shown to be suffering

[7] Previously, the corporate records had been audited by both the IRS and the New York City Sales Tax Commission. In each instance, bookkeeping errors were corrected and delinquent taxes paid (1110-1111).

from manic depressive disease, a condition severely impairing his ability to make rational decisions. Affidavits of a medical doctor and a neuropsychiatrist were presented to the court stating that Nester Vowteras' irrational decision not to retain separate counsel was the product of his severely depressed condition. The court refused to hold a hearing pursuant to 18 U.S.C. § 4244 on the question of competency, and denied petitioners' new trial motion.

The court of appeals affirmed the judgment of conviction as well as the denial of the new trial motion. *See* Appendix A, *infra*. That court held there was no showing of prejudice to either petitioner and that there was no "reasonable ground" for the district court to invoke the procedures of 18 U.S.C. § 4244.

REASONS FOR GRANTING THE WRIT

POINT I

Petitioners were entrapped as a matter of law and denied due process where their convictions were based upon criminal conduct which they were not predisposed to commit, which would not have occurred and which would have been impossible without the government's outrageous inducements and active participation.

This case presents a critical issue which should be considered in light of the Court's recent decision in *United States* v. *Russell*, 411 U.S. 423 (1973). Once again the Court is faced with a due process claim based upon outrageous conduct by government officials.[8] In *Russell* the majority reaffirmed the established doctrine that when government deception actually implants criminal design in a defendant's mind the entrapment defense becomes operative. Only a defendant's predisposition to commit the crime denies him the entrapment claim.

The awful specter of entrapping innocent victims, like these petitioners, has haunted this Court's conscience for more than forty years. The melancholy forecast by some

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[8] Although the entrapment issue was not briefed in the Second Circuit, it constituted petitioners' defense at trial and was the most significant question in that court. Under the circumstances of this case, this Court is urged to exercise its discretionary power to "notice plain error not assigned" particularly in criminal cases. Supreme Court Rule 40(1)(d)(2). That rule "confers a discretion that may be exercised at any time, no matter what may have been done at some other time." *Weems* v. *United States*, 217 U.S. 349, 362 (1909). *See Silber* v. *United States*, 370 U.S. 717 (1962) (issue not briefed or argued in either the court of appeals or this Court, but judgment was reversed); *United Brotherhood of Carpenters, et al.* v. *United States*, 330 U.S. 395, 411-412 (1947), and authorities there cited in footnote 25.

of its members has all too soon been fulfilled.[9] This case, more than any other, confirms the Court's worst suspicions of how innocent defendants can be entrapped into the commission of offenses which were unintended. Consequently, no case deserves review by this Court more than the one at bar.

Russell also teaches us that even where there is a predisposition to engage in crime, the conduct of law enforcement officers can be so outrageous, so shocking to the universal sense of justice, that the due process clause of the fifth amendment bars prosecution. This doctrine now needs further elaboration because *Russell* did not attempt to delineate the degree of outrage that must be found to warrant condemnation of overzealous government agents. Some definition is required to avoid this Court's being relegated to a never ending case by case determination. Such an approach would be an invitation to perennial appellate review of the *Betts* v. *Brady*[10] brand of nightmare.

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[9] In *Russell* four dissenting Justices agreed that the government's active inducement of and participation in the commission of the crime simply could not be tolerated. In *Sherman* v. *United States*, 356 U.S. 369, 382-383 (1958), Justice Frankfurter condemned the government's role in manufacturing illicit narcotics sales, writing:

> "No matter what the defendant's past record and present inclinations to criminality, or the depths to which he has sunk in the estimation of society, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society."

In *Sorrells* v. *United States*, 287 U.S. 435, 454 (1932), Justice Roberts, in an opinion in which Justices Brandeis and Stone joined, defined the essence of entrapment:

> "Entrapment is the conception and planning of an offense by an official, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the official."

[10] 316 U.S. 455 (1942).

Without benefit of any guidelines, district as well as circuit courts will continue to dispose of these due process claims adversely wherever there is the slightest predisposition to yield to entrapment. Here the agent actively planned, directed and organized the bribe. Does not *Russell* contemplate that such actions be evaluated with more than a comparative glance at the facts of that decision? Should there not be a more careful analysis of government conduct which is so flagrant as to foreclose prosecution?

The entrapment in this case is shocking and goes far beyond any other previously reviewed by this Court. Here petitioners' lack of predisposition was demonstrated as a matter of law. Moreover, this case differs from *Russell* in several critical respects. First, absent the government agent's participation, the crime of bribery would have been impossible. Second, the record demonstrates beyond peradventure that petitioners were not predisposed to bribe the revenue agent. Third, the bribery materialized as a result of the agent's maneuvering petitioners into a wholly untenable financial position.

Fourth, petitioners, who had never before committed any criminal act, were falsely persuaded to offer a bribe by the agent's apparent willingness to accept one in order to resolve a desperate situation for them. Fifth, and most important, when petitioners had decided to chance ruination of their business by disclosing the names of all those to whom they had paid commissions, the special agent quickly deterred petitioners' good intentions by raising the threat of publication of that information and investigation of those individuals.

Clearly, the creative activity in this case was the government's virtual underwriting of the alleged bribe and insur-

ing its completion. These are typical questions being raised in cases throughout the nation today which must be answered. For instance, in another petition for certiorari now pending before this Court, *Ruggiero* v. *United States*, Docket No. 73-1920, an identical issue dealing with entrapment has been presented for the Court's consideration.

Outrageous conduct by government agents can go beyond what is commonly known as entrapment and be so shocking as to "absolutely bar the government from invoking judicial processes to obtain a conviction." *United States* v. *Russell*, 411 U.S. 423, 93 S.Ct. 1637, 1643. The rule of *Russell* will bear bitter dividends if not redefined or alleviated. The longer promises of *Russell* foreclosing prosecution where government misconduct is so abominable or horrible, must be kept or the entrapment doctrine will become a myth. This case, more than any other, is a perfect vehicle for this Court to further fix the legal longitudes and latitudes of the *Russell* rule.

Particularly disturbing here is the IRS policy of instructing its agents to nurture bribery situations. While nefarious government activity is often employed in some areas of law enforcement, such as investigation of organized crime, narcotics and smuggling, it is certainly incongruous in noncriminal enforcement of the tax law.[11] Where

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[11] The appalling IRS policy prompted the trial court to register its concern:

> "There may be some question about the IRS policy of not telling somebody 'I'm straight and I'm not going to take any money.'" (A121)

Similarly, the United States Attorney recognized the court's displeasure with the IRS policy:

> "I know your Honor has had reservations in cases such as this by virture of your belief that perhaps the best thing for the IRS agents when faced with the kind of situation they're faced [with]

(Footnote continued on following page)

IRS agents perform audits which usually result only in a readjustment of deductions and tax liabilities, a policy encouraging criminal conduct by otherwise innocent and unwary taxpayers is surely unacceptable. Here the government's plan resulted in the agent's quick action to deter petitioners from disclosing the identity of the persons paid commissions—which would have substantiated their deductions—by affirmatively threatening the certain destruction of petitioners' long-time family business.[12] Agent Cooley thus exploited petitioners' desperation and forced them into engaging in criminal conduct which they were not otherwise disposed to commit.

No member of this Court can be other than unhappy about the government's overreaching in this bribery case. It is frightening to think that in order to obtain evidence of bribery our government officials must actually conspire and participate in the encouragement of that offense. The spectacle of IRS agents deliberately inducing and compelling men to reward them is indeed unwholesome. The use of these unbecoming tactics should rightly influence this Court's grant of this petition. For if the Court ever gives in to the government here, there will be no end to the entrapment of innocent men.

(Footnote continued from preceding page)

in this case would be to say to these people, be they Nestor or Nicholas Vowteras, or any person in the future, 'We don't accept bribes. I'm straight. You're barking up the wrong tree. Don't make overtures. That's not the policy of the Federal Government, not the policy of the IRS.'" (A151)

[12] Agent Cooley, once shown the list of persons to whom commissions had been paid, alarmed petitioners by saying:

"Now do you realize the fact that if you give me this, if you give me copies of this, that this could involve any one of these people." (A89)

POINT II

The trial court, when presented with uncontradicted evidence that one of two defendants with hostile defenses, represented by the same lawyer, was sufficiently mentally impaired to question his ability to decide whether to seek separate counsel and to assist in his own defense, must hold a hearing to determine his competency to waive these constitutional rights.

The Court must order separate counsel if failure to do so violates petitioners' sixth amendment right to counsel and fifth amendment right to due process of law.

Eight years ago this Court recognized the serious and weighty "protecting duty" imposed upon all trial courts to ascertain a defendant's competency to waive his constitutional right to counsel. *Westbrook* v. *Arizona*, 384 U.S. 150 (1966). Left unresolved, however, was the question presented here, namely the scope of that judicial duty when two defendants represented by the same lawyer have a serious conflict of interest and hostile defenses. The Court should grant certiorari to determine whether the trial court's failure to order separate counsel here resulted in the denial of both petitioners' rights guaranteed by the fifth and sixth amendments.

Nestor Vowterns has received continual psychiatric treatment for the past sixteen years. He has also been diagnosed by an accomplished medical doctor specializing in internal disorders as suffering from manic depressive disease.[13] Nestor frequently disguises his illness by

[13] These opinions were conveyed to the trial court in affidavits accompanying a motion for a new trial pursuant to Fed.R.Crim.P. 33. The court denied the motion without a hearing. *See* stenographic transcript, proceedings of March 1, 1973, at 20.

attributing his fatigue and depression to an overconsumption of glucose. However, extensive clinical and laboratory evaluations show no organic cause for the depression.

Prior to trial the court was alerted by the government to the problem of one lawyer representing both petitioners (A6). The court asked petitioners if they desired separate counsel and if they understood the seriousness of the conflict of interests (13B, 1D-2D).[14] When the court was subsequently alerted to Nestor's mental impairment by way of a new trial motion, no evaluation of his competency was made on the basis of medical testimony.[15] The uncontradicted facts demonstrate that on the day petitioners were faced with the critical question of selecting their counsel, Nestor was experiencing one of his periods of great depression.[16] Thus, this constitutional right was not knowingly and intelligently waived. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938).

Regrettably, the decision not to seek separate counsel severely prejudiced the rights of both petitioners. Nicholas was never present when any money was paid to the revenue agent. Moreover, the only recorded conversation linking him to the bribery was equivocal at best and a jury would

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[14] Numbers followed by "B" and "D" refer to in camera portions of the stenographic trial transcript.

[15] Even the *government* informed the court that it did not believe the defendants' rights were adequately protected (A14).

[16] Nestor declined to eat lunch with his brother Nicholas and their lawyer. Instead, he ate alone in a government cafeteria where he had coffee and a sweet bun. Both doctors familiar with Nestor's illness agreed that he was severely depressed at this time of great strain, and that his decision not to seek separate counsel was irrational. *See* new trial motion, dated February 21, 1974, attached affidavits.

in all likelihood have acquitted him had he been free to defend the charges on the merits.[17]

On the other hand, Nestor Vowteras, who did not testify, was left unprotected by counsel when Nicholas' testimony strongly incriminated him and suggested his own innocence (1131, 1194, 1210). Thus, there was no one to cross examine Nicholas and otherwise preserve Nestor's rights. Indeed, counsel was so consumed with the entrapment defense that no effort was made to advance Nestor's defense of incompetency to stand trial and assist in his own defense, or to waive his right to separate counsel.[18] The prejudice inherent in these circumstances is made manifest by the jury's conviction of Nestor as charged and its acquittal of Nicholas on two counts in the indictment.[19] As the Second Circuit reaffirmed in *United States* v. *DeBerry*, 487 F.2d 448 (1973), the prejudice to the nontestifying defendant is "almost inescapable." (487 F.2d 453, quoting *Morgan* v. *United States*, 396 F.2d 110, 114 [2d Cir. 1968].)

The importance of a hearing to unravel the conflicts generated by Nestor's incompetency cannot be understated. *Cf. Dusky* v. *United States*, 362 U.S. 402 (1960). The conviction of an incompetent is clearly unconstitutional. *Pate*

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[17] The jury acquitted the corporate accountant despite evidence tying him to the actual payment of bribery money and an agreement with the agent to pay him a bribe. The evidence against Nicholas Vowteras was far less convincing.

[18] It is apparent that a competent Nestor Vowteras would have been able to testify as to his entrapment. However, his impairment critically interfered with his ability to assist in the defense advanced in his case. Under those circumstances the court should have directed a psychiatric examination pursuant to 18 U.S.C. § 4244.

[19] Defense counsel conceded prior to trial that there could be "separate and distinct" defenses for Nestor (A11), but they were subordinated as a result of the decision to be represented by one lawyer (A12). Nestor, rendered incompetent to make rational decisions regarding his defense, left the decision to his lawyer (A13).

v. *Robinson*, 383 U.S. 375 (1966); *Bishop* v. *United States*, 350 U.S. 961 (1956).

Where a defendant is incapable of assisting in his own defense, he should not be put to that test and found wanting. Critically, here Nestor was not competent to waive his right to counsel and the Court failed to obtain medical assistance to make that determination. Thus, Nestor's waiver of separate counsel was invalid. Our system of justice abhors the prosecution of persons who are mentally impaired and a conviction whose underpinnings are shreaded by waves of mental depression is intolerable.

Thus, the unique combination of factors in this case should make it singularly useful for the Court to develop guidelines for trial courts faced with resolving serious conflicts of interest between codefendants represented by one lawyer.

Conclusion

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1170—September Term, 1973.

(Argued June 28, 1974 Decided July 18, 1974.)

Docket No. 74-1412

UNITED STATES OF AMERICA,

Appellee,

—against—

NICHOLAS VOWTERAS and NESTOR VOWTERAS,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges,*
and PALMIERI, *District Judge.**

Appeal from judgments of the United States District Court for the Eastern District of New York, following a jury trial before Orrin G. Judd, *J.*, convicting appellants of bribery and conspiracy to bribe. 18 U.S.C. §§ 201(b), 371.

Affirmed.

JACOB P. LEFKOWITZ, New York, N. Y. (Theodore Krieger, New York, N. Y., on the brief), *for Appellants.*

* Of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A

PAUL B. BERGMAN, Assistant United States Attorney (David G. Trager, United States Attorney for the Eastern District of New York, Raymond J. Dearie, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

The alleged errors stem from two essential claims: first, that the joint representation of the two appellant brothers by the same trial attorney was improper and second, that Nestor Vowteras was incompetent to stand trial and that his alleged incompetence should have required a hearing under 18 U.S.C. § 4244 and should now require a new trial.

We reject both contentions.

Because of the recently decided case of *United States* v. *DeBerry*, 487 F.2d 448 (2d Cir. 1973), the Government raised both with the court and counsel its concern with the joint representation at trial of the two defendants. The matter was carefully examined by the trial judge prior to trial on two separate occasions[1] and both appellants as well as their attorney uniformly expressed their desire for joint representation by single counsel.[2] Not content with their unequivocal statements on the record, the court conducted *in camera* proceedings with the same result. The defendants, as well as their attorney, were fully advised of the facts underlying the potential conflict[3] and they can-

1 *See United States* v. *DeBerry*, 487 F.2d 448, 452-54 (2d Cir. 1973); *United States* v. *Alberti*, 470 F.2d 878, 881-82 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *United States* v. *Foster*, 469 F.2d 1, 5 (1st Cir. 1972), *cited with approval in United States* v. *DeBerry*, *supra*, 487 F.2d at 453-54 n.6.

2 *See United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir. 1969) *cited in United States* v. *DeBerry*, 487 F.2d 448, 455 (2d Cir. 1973) (Moore, J., dissenting).

3 *See Morgan* v. *United States*, 396 F.2d 110, 114 (2d Cir. 1968).

not now repudiate their choice in the absence of a credible showing of "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation. . . ." *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970).[4]

With respect to the matter of the alleged incompetence of Nestor Vowteras, it is of special significance that his exposure to psychiatric treatment over a period of many years was made known to defense counsel by the Government prior to trial. In fact the psychiatrist was interviewed by defense counsel shortly after the indictment was returned. Against this factual background, the district court, in denying a new trial, properly exercised its discretion[5] in refusing to equate the incompetence claim of Nestor Vowteras with "newly discovered evidence."[6]

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4 *See also United States* v. *DeBerry*, 487 F.2d 448, 452-53 (2d Cir. 1973); *United States* v. *Alberti*, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). *Compare United States* v. *Paz-Sierra*, 367 F.2d 930, 932-33 (2d Cir. 1966). Nicholas Vowteras, who was ultimately acquitted on two counts, claims prejudice in that he would never have gone to trial with his attorney also representing an incompetent. Regardless of the merit of this argument, and accepting, contrary to persuasive reasons for believing otherwise, that prior to the trial he did not know of his brother's long history of psychiatric treatment, this claim is vitiated in that (a) his attorney knew of that history and (b) in any event some ten months before trial he was provided with Nestor Vowteras' post-arrest statement which contained explicit references to his history of treatment. Nestor Vowteras, who never took the stand, apparently makes no claim of prejudice other than to argue that he was incompetent to "waive" separate counsel. *See* text accompanying note 9, *infra*. *See generally* Schwartz, *Circumstances Giving Rise to Conflict of Interest Between or Among Criminal Codefendants Precluding Representation by Same Counsel*, 34 A.L.R.3d 470 *et seq.* (1970).

5 *United States* v. *Silverman*, 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971).

6 *See United States* v. *Soblen*, 203 F. Supp. 542, 565 (S.D.N.Y. 1961), *aff'd*, 301 F.2d 236, 242 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *United States* v. *Passero*, 290 F.2d 238, 244 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961).

With respect to the claim that Nestor Vowteras' alleged incompetence should have required a hearing pursuant to 18 U.S.C. § 4244, it is sufficient to note that the court below had no "reasonable ground" for believing he was incompetent and was, therefore, under no obligation to hold a hearing.[7] The observations of the appellant by the trial court,[8] as well as the appellant's longstanding and successful contacts with his business, his family and the community, substantially undermine any possible inference that there was reasonable ground to invoke the procedures of 18 U.S.C. § 4244.[9]

The judgments of conviction are affirmed.

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7 *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 & n.2 (2d Cir.), *cert. denied*, 408 U.S. 927 (1972); *United States* v. *Knohl*, 379 F.2d 427, 435 (2d Cir.), *cert. denied*, 389 U.S. 973 (1967).

8 *Cf. Zovluck* v. *United States*, 448 F.2d 339, 342-43 (2d Cir. 1971); *Bell* v. *United States*, 265 F. Supp. 311, 314, 318 (N.D. Miss. 1966), *aff'd*, 375 F.2d 763, 764 (5th Cir. 1967).

9 This conclusion applies equally to Nestor Vowteras' claim that he was incompetent to "waive" separate counsel.

APPENDIX B

Statutes Involved

18 U.S.C. § 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 201 provides in pertinent part:

> • • •
>
> (b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—
>
> (1) to influence any official act; or
>
> (2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or
>
> (3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty,
>
> • • •

Appendix B—Statutes Involved

18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. § 4244 provides:

> Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which

evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-281

NICHOLAS VOWTERAS AND NESTOR VOWTERAS,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that they were entrapped as a matter of law and that they were denied due process and their Sixth Amendment right to counsel by the trial court's refusal to hold a hearing to determine the competency of petitioner Nestor Vowteras.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of bribery, in violation of 18 U.S.C. 201(b), and conspiracy to bribe, in violation of 18 U.S.C. 371.[1] Each was sentenced to a year's imprisonment, with execution of

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[1]The indictment consisted of four counts, Count I alleged the conspiracy, and Counts II-IV alleged substantive bribery offenses. Petitioner Nicholas Vowteras was convicted on Counts I and IV and acquitted on Counts II and III. Petitioner Nestor Vowteras was convicted on all four counts. Co-defendant Murray Baron was acquitted on all counts.

all but two months of the sentence suspended, and each was placed on probation for the remainder of the sentence. The court of appeals affirmed (Pet. App. A; 500 F. 2d 1210).

The evidence at trial showed that in July 1972 Revenue Agent Kenneth Cooley was assigned the 1971 fiscal year tax return of the Argo Compressor Service Corporation ("Argo") for the purpose of conducting a routine corporate tax audit (Tr. 48).[2] Petitioners Nicholas Vowteras and Nestor Vowteras were, respectively, the President and Secretary-Treasurer of Argo. Each owned 46.5 percent of the corporate stock (Tr. 51). The tax return had been prepared by Argo's accountant, Murray Baron. Following notification to Argo by Cooley, an appointment was made for October 11, 1972, at which time Cooley was to begin the audit of Argo's books and records (Tr. 52, 53).

Cooley arrived at Argo on October 11, and, after meeting Baron and petitioners, began his audit (Tr. 61, 63-64, 78). After a routine morning of auditing, Cooley went to a local restaurant with Baron for lunch. As they were approaching the restaurant, Baron, referring to petitioners, said to Cooley: "These guys are probably going to make you some kind of a part time offer" (Tr. 84). He told Cooley that was the way "they work" and that Cooley should not be alarmed (Tr. 86). Cooley did not respond, and the two men had a general luncheon conversation (Tr. 86-88). However, after lunch Baron again raised the subject of a "part time offer" and asked Cooley if he would be interested. After answering in the negative, Cooley asked Baron what he meant by a part time offer, and Baron replied that "these guys would be glad to show their appre-

[2]"Tr." refers to the transcript of the district court proceedings.

ciation for any consideration [Cooley] could offer them in the area of travel and entertainment and commission expense" (Tr. 88-89). When asked what he meant by "appreciation," Baron told Cooley to wait until he saw figures (Tr. 90).

That afternoon Cooley continued the audit. At about four o'clock, Cooley was given a tour of the plant by Nicholas and Baron. During that tour Nicholas offered to give Cooley a portable air compressor. When Cooley refused, Baron advised Nicholas to take Cooley's address and send it to him. Cooley again refused (Tr. 92-95).

Cooley departed Argo that day with the understanding that he would return late in November to continue the audit (Tr. 99). When he returned home, he called the Assistant Regional Inspector for the Internal Revenue Service and reported the day's events. The next day, Cooley prepared an affidavit that detailed the pertinent conversations and events of the previous day (Tr. 101-103). Thereafter, every telephone and face to face conversation that Cooley had with petitioners and Baron was tape recorded (Tr. 107; Gov't. App. A-108).[3]

On November 29th, Cooley returned to Argo to continue his audit. Shortly before lunch, Cooley turned his attention to the "Commission Expenses" deduction of $63,396.69 (Tr. 116-118). In his examination of the books supporting the commission expense account, Cooley determined that about $59,000 worth of the deduction was represented by checks drawn to cash and endorsed by Nestor or Nicholas (Tr. 121-122, 158-162). It was explained to Cooley that the sum represented cash payments to purchasing agents who

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[3] "Gov't. App." refers to the appendix to the government's brief in the court of appeals, a copy of which has been lodged with this Court.

would not accept checks. Cooley characterized these payments as "kickbacks" (Tr. 124-126, 204). Cooley's request for a listing of purchasing agents to verify the expenditures was refused (Tr. 131-132).

After Cooley explained to Nicholas and Baron that if the payments were not verified they would lose their status as deductions and become dividends taxable to both Argo and the petitioners, Nicholas' and Baron's language became sprinkled with expressions such as, "whatever you can do for me, I'd really appreciate" and "I'd love to work anything out with you that I could, I don't care what it is" (see Transcribed Conversations Nos. 1, 1a, 1b, 1c, and 1d; Gov't. App. A-70, A-73, A-83, A-84, A-85).[4]

Throughout, Cooley neither rejected nor accepted the overtures of Baron and Nicholas but acted in accordance with the instructions he had received at training school and immediately after the October 11th meeting (Tr. 43-44, 114-115). The matter remained unresolved at the November 29th meeting.

Cooley's next audit was held on December 21. Present that day were Nestor and Baron. Nicholas, though present for about an hour in the morning, left Argo and was not present during any of the pertinent events and conversations of that day (Tr. 164). At that meeting, Cooley examined the "Promotional & Selling Expenses" deduction of $58,351.54 and found that a substantial portion of this deduction lacked supporting documentation (Tr. 165-166; 169-170).

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[4]Cooley's testimonial narrative of the transcribed conversations can be found at Tr. 146-162. The transcripts were admitted into evidence at Tr. 1401, 1403.

After lunch Baron gave Cooley a liquor carton containing five one hundred dollar bills (Tr. 214, 241-242). Thereafter Nestor promised an additional $14,500. He gave Cooley $4,500 more that day (Tr. 248-250; Transcribed Conversations Nos. 2-2d; Gov't. App. A-86—A-100), and future arrangements were made for the delivery of the remaining $10,000 (Transcribed Conversations Nos. 2c and 2d; Gov't. App. A-94—A-100).[5]

Cooley went to Argo for the last time on December 27. Nestor gave Cooley the remaining $10,000 (Tr. 261-266; Transcribed Conversations Nos. 3 and 3a; Gov't. App. A-101—A-103). Althought Nicholas was not present at the time the money changed hands, he subsequently entered the room and in the ensuing conversation indicated his knowledge and approval of the bribe (Transcribed Conversation No. 3b; Gov't. App. A-104—A-107).

Finally, bank records showed that on December 27, 1972, Nicholas Vowteras withdrew $10,000 from a personal savings account at the Atlantic Bank of New York (Government Exhibit 24c; Gov't. App. A-118; Tr. 280). Furthermore, on the same day Nestor Vowteras drew two checks, each for $5,000 on Argo's account at the same bank (Tr. 275; Government Exhibits 24A and 24B; Gov't. App. A-116, A-117; Tr. 280).

1. Petitioners' contention that they were entrapped as a matter of law is insubstantial. We note first that although the entrapment defense was raised at trial, the issue was not presented to the court of appeals. Petitioners' entrapment claim should not therefore be considered by this Court. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the entrapment issue was submitted to the

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[5]Cooley's narrative of the transcribed conversations of December 21 can be found at Tr. 170-176, 213-255.

jury with proper instructions (Tr. 1360-1366), and, as shown above, the evidence established that it was petitioners, not any representative of the government, who initiated the bribery scheme. Agent Cooley did no more than provide petitioners with an opportunity to commit an offense that they were clearly predisposed to commit. *United States* v. *Russell*, 411 U.S. 423.

2. Petitioner Nestor Vowteras' claim that the trial court should have held a hearing to determine his competency to waive separate counsel is equally without merit.[6] As the court of appeals found (Pet. App. A, p. A4), the trial court "had no reasonable ground for believing [Nestor] was incompetent and was, therefore, under no obligation to hold a hearing. The observations of [Nestor] by the trial court, as well as [Nestor's] longstanding and successful contacts with his business, his family and the community, substantially undermine any possible inference that there was reasonable ground to invoke the procedures of 18 U.S.C. §4244." See, *e.g.*, *United States ex rel. Roth* v. *Zelker*, 455 F. 2d 1105 (C.A. 2), certiorari denied, 408 U.S. 927.

Moreover, the question of petitioners' joint representation was fully explored by the trial court, and petitioners and their counsel were given ample opportunity to insist on separate counsel. As the court of appeals found (Pet. App. A, pp. A2-A3):

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[6]To the extent that petitioners contend that the district court erred in denying their motion for a new trial on the ground of newly discovered evidence as to petitioner Nestor's alleged incompetency, their contention is unsound. The court of appeals found that the evidence that petitioners proffered in their new trial motion was not "newly discovered." As the court stated (Pet. App. A, p. A3): "* * * [Nestor's] exposure to psychiatric treatment over a period of many years was made known to defense counsel by the Government prior to trial. In fact the psychiatrist was interviewed by defense counsel shortly after the indictment was returned."

> The matter was carefully examined by the trial judge prior to trial on two separate occasions and both appellants as well as their attorney uniformly expressed their desire for joint representation by single counsel. Not *content* with their unequivocal statements on the record, the court conducted in camera proceedings with the same result. The defendants, as well as their attorney, were fully advised of the facts underlying the potential conflict and they cannot now repudiate their choice in the absence of a credible showing of "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." * * *

Petitioners' joint representation was not prejudicial to their defense. Contrary to petitioner Nicholas' claim the joint representation did not prevent him from defending "on the merits." Petitioner Nicholas testified at trial as to both entrapment and his nonparticipation in the bribery, and he was in fact acquitted on two of the substantive counts. Petitioner Nestor's claim that joint representation prevented him from cross-examining Nicholas as to incriminating testimony is also groundless.[7] Nestor relied solely on the defense of entrapment, and due to the nature of the defense as well as the overwhelming tape recorded evidence, Nestor's commission of the offense charged was not in dispute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1974.

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[7]The alleged incriminating testimony related to the payment of the bribes (Tr. 1131, 1194, 1210). As shown earlier, the fact that the payments were made was not in dispute. Moreover, taken in context, the alleged incriminating testimony was intended to support the entrapment claim. Thus, it is highly unlikely that petitioner Nestor would have cross-examined on this issue even if represented by separate counsel. Cf. *United States* v. *Foster*, 469 F. 2d 1, 4 (C.A. 1).